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Nos. 89-1027 and 89-1028

In the Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, FT AL.

CSX TRANSPORTATION, INC., PETITIONERS

v.

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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TABLE OF AUTHORITIES

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Section 11341(a) of the Interstate Commerce Act (ICA) provides that a participant in an ICC-approved merger transaction "is exempt from the antitrust laws and all other law, including State and municipal law, as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a)). The question in this case is whether Section

11341(a)'s exemption shields the participant from enforcement of contractual provisions that otherwise would thwart implementation of the merger. See 89-1027 Pet. i. We explained in our opening brief that Section 11341(a) means what it says: it exempts the participant from *all* law, including laws governing the negotiation and enforcement of collective bargaining agreements, to the extent necessary to implement the ICC approved transaction. The court of appeals thus erred in concluding that Section 11341(a) reaches only "positive enactments" and does not preempt laws effectuating contractual rights. Pet. App. 12a-19a.

We restate the question presented in this case because the union respondents exhibit little interest in addressing it. The union respondents do not contest our basic proposition that Section 11341(a) exempts a carrier from enforcement of contractual provisions that otherwise would thwart implementation of a merger. Nor do they make any attempt to defend the court of appeals' view that Section 11341(a) is somehow inapplicable here because it reaches only "positive enactments." Pet. App. 18a. Indeed, the union respondents ultimately concede that Section 11341(a) exempts rail carriers from enforcement of contractual obligations involving the "capital structure" of their railroads. Resp. Br. 43 n.57 (acknowledging *Schwabacher* v. *United States*, 334 U.S. 182 (1948)). They contend, instead, that Section 11341(a) does not apply in this case because the ICC lacks "control over labor matters." Resp. Br. 43 & n.57. See also *id.* at 16, 24, 26, 33. They then invite this Court to decide an entirely different question—one that the court of appeals did not reach, that is the subject of the ICC's proceedings on remand, and that presently is in an interlocutory posture: namely, the ICC's responsibility to impose labor protective conditions under Section 11347 of the ICA.

1. *The union respondents do not defend the court of appeals' reasoning.* The threshold problem with the unions' position is that it bears no relation to what the court of appeals actually decided. The court of appeals did not rule that Section 11341(a) is inapplicable to the enforcement of collective bargaining agreements because those contracts involve labor matters. The court ruled that Section 11341(a) does not apply to enforcement of collective bargaining agreements because Section 11341(a) does not apply to enforcement of contracts of *any* type. Pet. App. 12a-19a.[1] In the court of appeals' view, Section 11341(a) reaches only "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a.[2]

The union respondents are entitled, of course, to defend a judgment on grounds other than those stated in the court of appeals' opinion. But in making that election, they tacitly concede that the court of appeals' rationale is indefensible. That concession is understandable. As we explained in our opening brief (at 22-27), Section 11341(a) gives a participant in an ICC-approved transaction an ex-

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[1] The court of appeals spoke in terms of "overrid[ing] contracts" (Pet. App. 12a); however, as we explained in our opening brief (at 22, 24-26), contracts derive their enforceability from common or statute law—in this case the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*

[2] That the court of appeals approached the question as one involving all contracts, and not simply collective bargaining agreements, is evident from its concern that acceptance of the government's argument would give the ICC power to override a "carrier's solemn undertaking, in a bond indenture or a bank loan." Pet. App. 13a. See also, *e.g.*, *id.* at 12a ("Nowhere does [Section 11341(a)] say that the ICC may also override contracts, nor has it ever * * * included even a general reference to 'contracts' much less any specific reference to [collective bargaining agreements]."); *id.* at 18a ("We are confident that Congress did not intend, when it enacted the immunity provision, to override contracts."); *ibid.* ("Congress exhibited a healthy respect for privately negotiated contracts.").

press exemption from *all* law to the extent necessary to carry out the transaction, and the term "law" is understood to include common law rules as well as statutes. See, *e.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99-101 (1972); *Warren* v. *United States*, 340 U.S. 523, 526 (1951); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938). Furthermore, this Court, in *Schwabacher*, 334 U.S. at 195-201, held that the substantively identical precursor of Section 11341(a), Section 5(11) of the ICA, exempts a participant in an ICC-approved transaction from enforcement of contractual rights—in that case the contractual rights of a carrier's minority shareholders. See Fed. Resp. Br. 27-28. The union respondents have no answer to these points beyond the assertion that they are "inapposite" in this instance because this case involves "labor matters." Resp. Br. 43 n.57.

2. *The union respondents' position is contradicted by the plain language of Section 11341(a).* The union respondents argued to the court of appeals that Section 11341(a) does not reach labor matters, and that court, for good reason, chose not to accept the argument. Section 11341(a), by its terms, does not give "labor matters" special treatment. The union respondents contend that Section 11341(a)'s "plain language" supports their assertion (Resp. Br. 24), but they fail to confront (or even acknowledge) the words Congress actually used. Section 11341(a) expressly exempts participants in ICC approved transactions "from the antitrust laws and from all other law." 49 U.S.C. 11341(a).[3] It makes no mention whatever of a special exception in the case of labor matters. Instead,

[3] The union respondents characterize Section 11341(a) as "an implied repeal statute" (Resp. Br. 24). There is, however, nothing "implied" in the statute at all. By its terms, Section 11341(a) *expressly* exempts participants from all law as necessary to implement an ICC approved transaction.

the Section 11341(a) exemption is subject to only one very important qualification: the exemption extends only so far "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a).[4] See *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298-300 (1987) (Stevens, J., concurring).

3. *The union respondents' argument that the ICC has no "jurisdiction" over labor matters is neither relevant nor correct.* The union respondents repeatedly assert that Section 11341(a) should be given a more restrictive reading because the ICC lacks "jurisdiction," "authority," or "control over labor matters." Resp. Br. 16, 24-25, 26, 33, 35, 36, 41, 43 & n.57. This argument fails for two reasons. First, the applicability of Section 11341(a)'s exemption does *not* depend on whether the ICC has "jurisdiction" over the subject matter of the preempted law—Section 11341(a) expressly exempts participants from the "antitrust laws and all other laws" as necessary to carry out an ICC approved transaction. 49 U.S.C. 11341(a). Second, the union respondents' assertion is simply not correct; the ICC's empowering statute requires the agency to consider and address labor matters.

One of the purposes of the ICA's national transportation policy, which is administered by the ICC, is "to promote a safe and efficient rail transportation system" while "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry" (49 U.S.C. 10101a). The ICA gives the ICC "exclusive" authority over transactions involving the consolidation, merger, or acquisition of control of rail carriers (49 U.S.C. 11341(a), 11343). These transactions inevitably affect labor. See *United*

[4] The court of appeals did not reach the question of what constitutes necessity within the meaning of the exemption, and that issue is not presently before the Court in this case.

States v. *Lowden*, 308 U.S. 225, 233 (1939). The ICA therefore expressly *requires* the ICC to consider labor matters when performing its "public interest" review of a proposed transaction (49 U.S.C. 11344), and the ICA expressly *requires* the ICC "to provide a fair arrangement" for "employees who are affected by the transaction" (49 U.S.C. 11347). The union respondents' blanket assertions that Section 11341(a) does not apply to labor matters because the ICC has no jurisdiction over such matters cannot be reconciled with the plain terms of the ICA.

4. *The union respondents incorrectly assert that their interpretation is consistent with past practices.* Because the ICA's language provides no comfort for their position, the union respondents must look to other sources for support. They turn first to historical practices. The unions argue (Br. 26-27) that the ICC historically has declined to exercise jurisdiction over labor matters. That is not so. See, *e.g.*, *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963); *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger, Etc.*, 347 I.C.C. 506 (1974). The union respondents also rely on a 1934 statement of the Chairman of the ICC that the agency has "no jurisdiction over labor matters." Resp. Br. 26-27. As the unions acknowledge, however, that statement was addressed to the specific question whether the ICC should assist in the enforcement of the RLA. *Ibid.* Moreover, it was made six years prior to Congress's addition to the ICA of the requirement that the ICC impose labor protective conditions on ICC-approved transactions. See Fed. Resp. Br. 35-38.

The union respondents next observe (Br. 13 n.26, 27-29) that, in the past, railroads have occasionally entered into various "lifetime employment" agreements with rail unions in connection with ICC approved mergers. The

unions contend that railroads would not have agreed to such terms if Section 11341(a) had preempted enforcement of the existing collective bargaining agreements. But any such inference is unwarranted. The railroads may have had other reasons for entering into those agreements. They may have concluded that Section 11341(a) would not permit the labor rearrangements they sought because those rearrangements were not "necessary" to carry out their transactions. See 49 U.S.C. 11341(a). The railroads may have sought to avoid litigation or may have found the terms of the "lifetime employment" agreements desirable even if not required. Thus, the existence of those agreements does not provide any useful guidance on the meaning of Section 11341(a).[5]

The union respondents next argue (Br. 28-32) that the ICC's interpretation of Section 11341(a) is a recent innovation. But the ICC expressly stated, as early as 1974, that Section 11341 and its precursors reach collective bargaining rights. See *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-512 (1974) ("the Commission may relieve the railroad from the requirements of [the Railway Labor Act] insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2)").[6] And the courts have applied that interpretation as early as 1963. *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d

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[5] The union respondents also contend (Br. 7 n.12) that the effect of the ICC's interpretation of Section 11341(a) is to render "unnecessary" the making of such agreements. That is not accurate. The railroads may continue to find such agreements useful for the reasons we describe in the text.

[6] In any event, an agency is entitled to revisit, refine, and reformulate its interpretations in light of its evolving wisdom and experience. See, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *NLRB* v. *J. Weingarten*, 420 U.S. 251, 265-266 (1975).

424, 432 (8th Cir. 1963) ("We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5(11)."). The unions cite (Br. 29-32) two ICC cases that, in their view, indicate that Section 11341(a) does not preempt enforcement of collective bargaining agreements. In both of those cases, however, the ICC stated that the rail carriers were not entitled to Section 11341(a) relief because the requested exemption was not necessary to carry out the ICC-approved transaction.[7]

The union respondents also assert (Br. 32-33) that the ICC has no "expertise" in labor relations. The ICC, however, administers the ICA and obviously is the expert agency as to the interpretation and application of the ICA's labor provisions. Moreover, the ICC cases that the unions cite in support of their assertion involve the ICC's referral of disputes to arbitrators appointed pursuant to the ICC's labor protective conditions (49 U.S.C. 11347). The ICC has authority to review those arbitration decisions, *Chicago & N.W. Transp. Co.—Abandonment*, 366 I.C.C. 373 (1987), aff'd *sub nom. International Brotherhood of Electrical Workers* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988). The ICC's referral of these matters simply reflects a sensible use of the arbitration process. See *United Transp. Union* v. *United States*, 905 F.2d 463, 470 (D.C. Cir. 1990).

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[7] See *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 170 (1967) ("By its terms, section 5(11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved . . .'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint * * *."); *Chicago, St. P., M. & O. Ry.—Lease*, 295 I.C.C. 696, 702 (1958) ("It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order.").

5. *The union respondents incorrectly assert that the ICA's legislative history supports their interpretation.* The union respondents also argue (Br. 33-44) that the ICA's legislative history supports their contention that Section 11341(a) contains an implicit exception for labor matters. As we explain in our opening brief (at 29-38), that assertion is incorrect. The legislative record indicates that Section 11341(a) was enacted to encourage mergers and consolidations, which—as Congress must have realized—almost invariably require extensive rearrangement of work forces and alteration of collective bargaining agreements. See *Lowden*, 308 U.S. at 232-234. Moreover, on two occasions—in 1933, and again in 1940—Congress expressly refused to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements. See Fed. Resp. Br. 30-38.

a. As we explained in our opening brief (at 30-34), the Emergency Railroad Transportation Act of 1933 (ERTA) contained temporary provisions (Title I) and permanent provisions (Title II) concerning rail consolidations. Section 10(a) exempted carriers affected by orders under Title I from other legal "restraints or prohibitions," see § 10(a), 48 Stat. 215, but also contained a proviso expressly preserving collective bargaining agreements. *Ibid.* Section 202(15) exempted carriers affected by orders under Title II from other legal "restraints and prohibitions," but it did not contain any such proviso. See § 202(15), 48 Stat. 219. As we also pointed out (Br. 33-34), Congress's decision to include a proviso preserving collective bargaining agreements in the temporary provisions of Title I, but not to include such a proviso in Section 202(15) as part of the permanent provisions of Title II, confirms Congress's intent that Section 202(15) could operate to limit the enforcement of collective bargaining agreements. See,

e.g., Russello v. *United States*, 464 U.S. 16, 23 (1983). And it is Section 202(15) that is now Section 11341(a).

The union respondents attempt, unsuccessfully, to rebut that inference. They argue (Br. 37-38) that Section 10(a) in Title I contained the proviso protecting collective bargaining rights because it addressed the authority of the Federal Railroad Coordinator, who had jurisdiction over labor matters. The unions then contend that there was no need to state this restriction expressly in Section 202(15) in Title II because it dealt with the authority of the ICC, which (in the unions' view) did not have power over labor matters. This distinction between the role of the Coordinator and that of the ICC is both inapposite and flawed. The unions mistakenly presume that carriers acting pursuant to ERTA orders were exempt from legal "restraints or prohibitions" (§ 10(a), 48 Stat. 215; § 202(15), 48 Stat. 219) *only* to the extent that the restraint or prohibition fell within the subject matter jurisdiction of the agency that issued the order. Neither Section 10(a) nor Section 202(15) contained any such limitation; instead, carriers were "relieved from the operation of the antitrust laws * * * and of *all* other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order." § 202(15), 48 Stat. 219 (emphasis added).[8]

In any event, Section 10(a) does not support the union respondents' distinction between the role of the Coordinator and the role of the ICC. Section 10(a)'s exemption and its associated proviso apply to actions taken by the Coordinator *or* the ICC pursuant to Title I. See § 10(a), 48 Stat. 215 ("The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any

[8] As we have observed (p. 5, *supra*), the union respondents employ the same mistaken premise with respect to Section 11341(a).

order of the Coordinator *or Commission* made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by law * * *.") (emphasis added). Title I provided that the ICC had authority to review and, if necessary, modify the Coordinator's orders and hence the ICC's power over labor matters was of comparable scope. See ERTA § 9, 48 Stat. 214-215.

b. Nor do the union respondents have an adequate response to Congress's actions in 1940. As we stated in our opening brief (at 35-38), when Congress enacted the Transportation Act of 1940, further amending the ICA, it specifically rejected an amendment that the unions now insist is the law. Representative Harrington's proposed amendment would have prohibited "the impairment of existing employment rights of said employees." See 84 Cong. Rec. 9882 (1939). Congress rejected the Harrington Amendment and enacted in its place a provision (§ 5(2), now codified as Section 11347 of the ICA) that directs the ICC to require a "fair and equitable arrangement" for employees who are adversely affected by ICC approved transactions. § 7, 54 Stat. 906-907. See Fed. Resp. Br. 35-38. The union respondents argue (Br. 39 n.55) that Congress "modified"—rather than "rejected"—the Harrington Amendment. Even if one accepts the unions' semantic distinction, our point remains valid: "Congress d[id] not intend *sub silentio* to enact statutory language that it ha[d] earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 175-177 (1961).

6. *The union respondents' reliance on Section 11347 is misplaced.* The union respondents next argue (Br. 45-47) that Section 11347 prohibits the ICC from modifying or

eliminating an employee's contractual rights. The issue decided by the court of appeals and the issue before this Court is whether Section 11341(a) exempts participants from enforcement of contractual obligations. See Pet. App. 12a-19a. More specifically, the question is whether Section 11341(a)'s phrase "all other law" includes the law governing the enforcement of contracts in general and collective bargaining agreements in particular. The unions invite this Court to resolve a wholly distinct issue—the meaning of Section 11347—that the court of appeals did not decide, that the ICC has addressed in the remand proceedings, and that the court of appeals has not yet had an opportunity to review.[9]

Section 11347, which originated in the Transportation Act of 1940 (see p. 11, *supra*), directs the ICC to impose conditions on ICC-approved transactions requiring carriers "to provide a fair arrangement" for employees who are adversely affected by implementation of the transaction. 49 U.S.C. 11347. Rail labor and rail management have been engaged in a longstanding dispute over the content and import of those conditions. Rail labor contends that under Section 11347 the ICC must impose, as a term of the ICC-approved transaction, requirements that the carriers' employees retain all of their rights under the RLA and existing collective bargaining agreements and receive certain additional compensation. See Resp. Br. 45-47. Rail management disagrees, contending that Section 11347 requires the ICC to impose terms that provide for arbitration of disputes arising from work force adjustments and

[9] The union respondents raise a number of other issues that are not presented in this case, including whether the overriding of contractual obligations was, in the particular circumstances, "necessary" to the transaction (Br. 26), and the particular facets of the "Orange Book" agreements (Br. 46 n.59), a matter peculiar to certain aspects of the dispute in No. 89-1028.

for compensation to employees adversely affected by the transaction. See 89-1027 Pet. Br. 43-47.

We submit that if Section 11347 has any relevance to the present issue, it cuts against the unions' position. Congress enacted Section 11347 in recognition that employees would be adversely affected by ICC-approved transactions. See Fed. Resp. Br. 37-38. Congress's requirement of protective conditions with respect to those effects evidences Congress's view that implementation of ICC-approved rail consolidations and mergers is likely to impair collective bargaining agreements. Beyond this limited observation, which takes note of the parallel existence of Section 11347 and its announced purpose, we believe it is neither necessary nor provident for this Court to reach a concluded view on the meaning of that Section. Section 11341(a) concerns the *legal consequences* flowing from ICC approval of a rail transaction. That issue, as *Schwabacher* illustrates, has importance outside of, as well as within, the rail labor context. Section 11347 is concerned solely with what labor terms must be included *as part of the transaction*. The resolution of the Section 11341(a) issue is critical, but it will not finally determine labor's rights.

Moreover, the ICC issued a decision, following the court of appeals' remand of the record in this case, that addresses the ICC's responsibility under Section 11347. See *CSX Corp.—Control—Chessie System, Inc. & Seaboard Coast Line Industries, Inc.*, 6 I.C.C. 2d 715 (1990). That decision is subject to judicial review in the court of appeals. This Court, in turn, will have the opportunity to review, if necessary and after full briefing, the court of appeals' considered judgment on this matter.

7. *The ICC's interpretation of Section 11341(a) does not deprive parties of Fifth Amendment rights.* The union respondents contend (Br. 47-50) that the ICC's interpreta-

tion of Section 11341(a) would deprive the unions (and presumably those they represent) of property in violation of the Due Process and Just Compensation Clauses of the Fifth Amendment. There is no merit to that contention. As the unions concede (Br. 48), it has long been settled that Congress may limit or bar the enforcement of existing contracts if it rationally concludes that such action is in the public interest. See *Wilson* v. *New*, 243 U.S. 332, 348-354 (1917); *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467, 480-481 (1911). Section 11341(a) plainly satisfies that test: it exempts a carrier from enforcement of contractual provisions to the extent necessary to permit the carrier to implement a transaction that has been found to be in the public interest.

The unions' claim of contractual impairment is particularly weak in this case because the collective bargaining agreements at issue were entered into long after Section 11341(a) had become an established part of the legal landscape. Section 11341(a) dates back to the Transportation Act of 1920, and has for 70 years been a part of the legal context in which rail labor agreements have been negotiated. Thus, the union respondents' contracts were necessarily subject to Section 11341(a)'s preemptive effect at the time they were negotiated, and no claim of an unconstitutional taking can arise from the incidence of that effect. Indeed, even if the unions could claim deprivation of a property right, the ICA's labor protective conditions, set forth in Section 11347, would assure compensation for any such deprivation.

8. *The union respondents' arguments cannot be reconciled with the purpose of the ICA consolidation provisions.* The ICA's consolidation provisions are intended to foster those mergers that are in the public interest, while at the same time accommodating to the fullest extent possible the competing claims of persons, including employees,

who may be adversely affected by the transactions. See Fed. Resp. Br. 39-40. The ICA is particularly solicitous of rail labor interests: the ICC must take into account the interests of rail employees when conducting its public interest review (49 U.S.C. 11344(b)) and must impose special conditions to protect the interests of employees who are adversely affected by the transaction (49 U.S.C. 11347). Finally, Section 11341(a) exempts a participant from other law, but only to the extent "necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). Notwithstanding these provisions, the union respondents insist that rail employees are entitled to full enforcement, under the Railway Labor Act, of all of the terms of their collective bargaining agreements. The RLA's "virtually endless" process would pose a serious impediment to the consummation of rail mergers. See Fed. Resp. Br. 40-42. Section 11341(a) does not implicitly except that process, uniquely among "all other law" (49 U.S.C. 11341(a)), from its preemptive sweep.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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